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Pride and Prejudice and Proof: Quotidian Factfinding and Rules of Evidence

ROSANNA CAVALLARO*

Can we, in daily life, understand each other?

—E.M. FORSTER¹

INTRODUCTION

Among the many intersections between law and literature is this: Just as the legal process is concerned with the accurate and orderly evaluation of disputed facts and past events, and the parts played by people in those events,² so, too, many works of fiction concern themselves with identical inquiries.³ What makes a good or great novel is, to

* Professor of Law, Suffolk University Law School. A.B., Harvard College, J.D. Harvard Law School. My thanks go first to Professor Roger Park, whose suggestion of *Pride and Prejudice* as summer reading for evidence teachers set me on this Article's path. In addition, I am grateful for the thorough research of Michael Dowley, and for the continuing support of Dean Robert H. Smith.

1. E.M. FORSTER, ASPECTS OF THE NOVEL 100 (1927).

2. See, e.g., FED. R. EVID. 102 (purpose and construction of rules "to the end that the truth may be ascertained and proceedings justly determined"). But see Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) (recognizing that although "Fed. R. Evid. 102 defines the 'purpose' of the rules as 'that the truth may be ascertained,' some of the rules have non-veritistic dimension, while others mix veritistic and non-veritistic concerns"). Certainly, the traditional assumption has been that the primary purpose of adjudication is truthseeking, although this premise has been challenged by a variety of scholars proposing alternative purposes. See Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1230 (2001) (suggesting that "the rules governing what happens inside the courtroom can be understood adequately only in the context of the state's central project of regulating behavior outside the courtroom" through the provision of incentives for that behavior) (citing, as an example of the truth seeking approach, inter alia, H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 845 (1982) ("The process of litigation is designed for the reconstruction of an event that occurred in the recent past."), and citing, as an example of the non truth seeking approach, inter alia, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985) (contending that the purpose of adjudication is to produce "acceptable verdicts")); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 38-43 (Winter 1986-87) (suggesting that the role of trial is to produce "catharsis").

Even if some of these interests are furthered by adjudication, there can be little doubt that the appearance and/or actuality of truthseeking are important aspects of the trial process.

3. The term "novel" can describe a broad range of works of fictional narrative prose, or, more narrowly, a singular literary genre distinguishable from, e.g., romance, epic, or even satire. Compare WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 809 (1970) (defining "novel" as "an invented prose

some degree, measured by the novelist's skill in rendering characters and events for the reader's evaluation, through dialogue and other descriptive narrative.⁴ In addition, just as the legal process asks judge or jury to evaluate a variety of proofs in order to allocate criminal blame or civil liability, novels invite the reader to exercise her judgment about individuals and events, to determine, by the novel's end, the truth of those events. Finally, where the legal system has constructed rules of evidence to shape the body of proof that may be used to determine facts,⁵ writers of fiction offer the reader a variety of "proofs" by which she may judge the truth of their works.⁶

narrative that is long and complex and deals with human experience through a connected sequence of events"), with NORTHROP FRYE, *ANATOMY OF CRITICISM* 304 (1957) (suggesting that the novel's "characteristics, whatever they are, are such as make, say, Defoe, Fielding, Austen, and James central in its tradition, and Borrow, Peacock, Melville, and Emily Bronte somehow peripheral"). M.M. Bakhtin describes the novel as a broad literary form that "took shape precisely at the point when epic distance was disintegrating, when both the world and man were assuming a degree of comic familiarity, when the object of artistic representation was being degraded to the level of a contemporary reality that was inconclusive and fluid." M.M. BAKHTIN, *Epic and Novel*, in *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 5, 39 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981). Bakhtin describes, too, a "lengthy battle for the novelization of the other genres [of literature] . . . a battle to drag them into a zone of contact with reality." *Id.*

4. See, e.g., FRYE, *supra* note 3, at 354 ("The objective world affords a provisional means of unifying experience, and it is natural to infer a higher unity, a sort of beatification of common sense."); ERICH AUERBACH, *MIMESIS* 554 (Willard R. Trask trans., Princeton Univ. Press 1953) (surveying different literary periods' attitudes toward the place and significance of "random individuals from daily life in their dependence upon current historical circumstances").

5. See, e.g., MCCORMICK ON EVIDENCE § 1 (John W. Strong et al. eds., 5th ed. 1999) ("The law of evidence is the system of rules and standards regulating the admission of proof at the trial of a lawsuit").

6. Such proof runs the gamut from the "objective" first and third person narratives of classic Victorian fiction like Charles Dickens's *Bleak House* or Anthony Trollope's *Barchester Towers*, to the purposely distorted "testimony" of more contemporary narrators like Oskar Matzerath in Günter Grass's *The Tin Drum*, to the shifting multiple consciousnesses of Virginia Woolf's fiction. Indeed, where the Victorian novel is characterized by a kind of unreflecting narrative authority and a corresponding passivity by the reader, modern fiction invites the reader to perform a critical evaluation of the factfinding process through techniques like the self-conscious manipulation of aspects of a singular, subjective individual's testimonial credibility, and the construction of a near-objective reality "by means of numerous subjective impressions received by various individuals (and at various times)." AUERBACH, *supra* note 4, at 536. Compare CHARLES DICKENS, *BLEAK HOUSE* 1 (Stephen Gill ed., Oxford Univ. Press 1998) (1853) ("London. Michelmass Term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall."), with GÜNTER GRASS, *THE TIN DRUM* 15 (Ralph Mannheim trans., Pantheon Books 1963) ("Granted: I am an inmate of a mental hospital; my keeper is watching me, he never lets me out of his sight; there's a peephole in the door, and my keeper's eye is the shade of brown that can never see through a blue-eyed type like me."), and VIRGINIA WOOLF, *TO THE LIGHTHOUSE* (1927). See also AUERBACH, *supra* note 4, at 535 (comparing the "attitude" of Virginia Woolf toward her characters in *To the Lighthouse*—"representing herself to be someone who doubts, wonders, hesitates, as though the truth about her characters were not better known to her than it is to them or to the reader"—with "that of authors [like Dickens, Meredith, Balzac, or Zola] who interpret the actions,

As a work of fiction, Jane Austen's 1813 novel *Pride and Prejudice* allows the reader an extraordinary opportunity to make connections between literary and adjudicatory factfinding by presenting the correspondence at multiple levels.⁷ Like many works of fiction, *Pride and Prejudice* presents narrative "proofs" for the reader's evaluation, but in addition to this, the novel takes as its central theme the evaluative process itself. Throughout the book, Austen's characters struggle to form judgments about each other even as they are simultaneously evaluated by the reader.⁸ At its heart, *Pride and Prejudice* is about the difficulty of determining the truth—about the character of another, or the nature of an event—and about the mistakes and injuries that are possible when people attempt to form such conclusions. Since the protagonists' determinations hinge, in large part, on their perceptions of past events in which those being judged⁹ have played important parts, the novel invites the reader to reflect upon how we find facts in our ordinary lives. In so doing, the novel resonates in a number of useful ways with the legal fact-finding process.¹⁰

This Article proposes to explore the factfinding in which Austen's characters engage in *Pride and Prejudice* against the backdrop of the

situations, and characters of their personages with objective assurance," telling the reader "out of their certain knowledge what their characters did, what they felt and thought while doing it, and how their actions and thoughts were to be interpreted"). Auerbach distinguishes those novelists, like Stendahl and Balzac, in whose work "we frequently and indeed almost constantly hear what the writer thinks of his characters and events," from others, like Flaubert, whose "role is limited to selecting the events and translating them into language . . . in the conviction that every event, if one is able to express it purely and completely, interprets itself and the persons involved in it far better and more completely than any opinion or judgment appended to it could do." *Id.* at 486.

7. Tony Tanner, *Notes on the Text, in JANE AUSTEN, PRIDE AND PREJUDICE* 47 (Tony Tanner ed., Penguin Books 1985) (1813) (noting that the first edition was published in 1813).

8. See text accompanying notes 22–25 (describing the fictional community's first encounter with Fitzwilliam Darcy).

9. The pun is intended. It is no accident that this term is used to describe both what we ask of the legal process and how we form opinions about others in our ordinary lives. In addition, throughout the novel, Elizabeth Bennett, Fitzwilliam Darcy, and others use the terms "just" and "unjust" to describe the conclusions and character assessments in which they and others engage. See, e.g., AUSTEN, *supra* note 7, at 124 (Wickham on Darcy, "I can hardly be just to him."); *id.* at 252 (Elizabeth to Jane about Wickham, "I know you will do him such ample justice, that I am growing every moment more unconcerned and indifferent."); *id.* at 388 (Elizabeth to Darcy after accepting his proposal: "your feelings were always noble and just"); *id.* at 376 (Darcy to Elizabeth after she accepts his proposal: "You know not, you can scarcely conceive, how [Elizabeth's words refusing Darcy's first proposal] have tortured me;—though it was some time, I confess, before I was reasonable enough to allow their justice.").

10. Examples of disputed facts that are central to each character's assessment of the other include the treatment of Wickham by Darcy after the death of Darcy's father, the attempted seduction of Darcy's sister, Georgiana, by Wickham, and the extent and nature of Charles Bingley's feelings for Jane Bennett.

Federal Rules of Evidence, with a view to evaluating some of the policies, perceptions, and principles that underlie those rules of proof. The goal is to offer a literary evaluation of three bedrock principles of American evidence: the bans on hearsay and on the use of propensity evidence, and the restrictions on the use of evidence drawn from privileged communications.¹¹ In addition, this Article proposes to identify some of the characteristics that may strengthen or impair the factfinder's skill in receiving and evaluating proofs.

Although when she wrote *Pride and Prejudice*, Austen was not at all concerned with the legal system or its procedures for determining disputed facts, the novel's examination of the kinds of proof that form the basis of quotidian personal judgments offers fertile ground for evaluating modes of judicial proof.

In addition, *Pride and Prejudice* also offers a useful critique of the factfinder's role. The novel presents an array of characters each of whom has certain strengths and weaknesses in their judgment of people and events.¹² Through the characters' triumphs and missteps, the reader is invited to reflect on what qualities make a successful or unsuccessful finder of fact. Since juries are just people asked to find facts as they ordinarily do, Austen's examination of how such quotidian factfinding is done en-

11. Projects with a similar goal, using literature to evaluate law, are now quite common, *see, e.g.*, PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000); RICHARD POSNER, *LAW AND LITERATURE* (1988); BROOK THOMAS, *CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE* (1997); RICHARD WEISBERG, *THE FAILURE OF THE WORD* (1984); JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984), although I have not come across any involving *Pride and Prejudice* or the Rules of Evidence. For writing by a legal scholar on the work of Jane Austen, *see* WHITE, *supra*, at 191 (in which Professor White suggests that Jane Austen's Emma asks the essentially political questions, "Is it possible to have a larger community whose central value is kindness, its central method conversation?" and "How can we move from an ideally created world of two, in the text or in the world, to a larger world of social and political life and action?").

12. For those unfamiliar with the novel, *Pride and Prejudice* tells the story of a family of daughters in a small English village, and of their mother's matrimonial ambitions for each of them. The two older girls, Jane and Elizabeth, are the focus of the novel: Jane, the older and somewhat more naïve young woman, and Elizabeth, the younger, smart and quick to form judgments. When Jane and a new neighbor, Charles Bingley, fall in love, Bingley's family and nearest friend, Fitzwilliam Darcy, act to extricate him from the romance, believing that Bingley's wealth places him a step above Jane in social rank and expectations. At the same time, Elizabeth is repeatedly thrown into Darcy's company and finds that he is rude and condescending. At the novel's midpoint, Elizabeth is surprised and offended by a marriage proposal from Darcy, in which he describes how he had struggled to overcome his feelings for her because of her lower social status. She later learns that Darcy is in fact a good, if somewhat reserved, man and that she has misunderstood many of the words and events upon which she had constructed her judgment of him. In the end, she marries Darcy and Jane marries Bingley.

riches our understanding of what juries are capable of doing in adjudication.¹³

I must acknowledge early on a vulnerability of this genre of scholarship: For this Article to have value in a legal context, one must accept the premise that the novel's insights have some worth beyond mere entertainment. I contend that, like all great literature, Austen's novel captures a kind of truth that amplifies and enriches the truth of our own experience and can therefore offer meaning beyond the aesthetic.¹⁴ The satisfaction that we get as readers when we observe the missteps of Elizabeth Bennett and Fitzwilliam Darcy, as well as their subsequent reassessments of conduct and character, derives in significant part from our recognition of the aptness of Austen's observations.¹⁵ Were these observations less true, the novel would be less of a success. Accordingly, to the extent that we take pleasure in the novel, we implicitly affirm the accuracy of Austen's insights about those processes.¹⁶ Having made this leap, I ask next

13. Scholars are already well aware that there are differences of race, gender, class, and other traits among jurors and that those differences can affect deliberations. See, e.g., HARRY KALVEN JR. & HANS ZEISEL, *THE AMERICAN JURY* (Univ. of Chi. 1971) (1966) (comprehensive seminal study of the dynamics of jury deliberation); Nancy S. Marder, Note, *Gender Dynamics and Jury Deliberations*, 96 *YALE L.J.* 593, 593-98 (1987) (citing studies).

Other recent scholarship has attempted to integrate ordinary factfinding with that which is required of us in specific adjudicatory and quasi-adjudicatory settings. See, e.g., Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 *HARV. HUM. RTS. J.* 83, 85, 92-108, 135 (1990), excerpted in RICHARD LILlich & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 452-56 (3d ed. 1995).

14. The novelist and critic E.M. Forster has explained this capacity of literature as follows:

For human intercourse, as soon as we look at it for its own sake and not as a social adjunct, is seen to be haunted by a spectre. We cannot understand each other, except in a rough and ready way; we cannot reveal ourselves, even when we want to; what we call intimacy is only a makeshift; perfect knowledge is an illusion. But in the novel we can know people perfectly and, apart from the general pleasure of reading, we can find here a compensation for their dimness in life. In this direction fiction is truer than history, because it goes beyond the evidence, and each of us knows from his own experience that there is something beyond the evidence, and even if the novelist has not got it correctly, well—he has tried. . . .

And that is why novels, even when they are about wicked people, can solace us; they suggest a more manageable human race, they give us the illusion of perspicacity and of power.

FORSTER, *supra* note 1, at 98-99.

15. *Id.* at 97 ("[A] novel is a work of art, with its own laws, which are not those of daily life, and that a character in a novel is real when it lives in accordance with such laws. . . . The barrier of art divides [characters] from us. They are real not because they are like ourselves (though they may be like us) but because they are convincing.").

16. Professor James Boyd White cites E.M. Forster's discussion of Jane Austen's *Mansfield Park* to explain what makes some fiction "true and false to life":

She is a miniaturist, but never two-dimensional. All her characters are round, or capable of roundity. . . . Why do the characters in Jane Austen give us a slightly new pleasure each time they come in, as opposed to the merely repetitive pleasure that is caused by a character

that the reader be willing to use these insights to measure explicitly legal tools of factfinding.¹⁷

While Austen might not have intended her work to serve as fodder for such a systemic critique, her intention to challenge readers about the nature of quotidian factfinding and the search for truth cannot be doubted. Her title previews that intention, declaring that the subjects of the narrative are two human attributes that can obstruct the search for truth: pride and prejudice. In addition, although the story is offered through an unidentified and apparently omniscient narrator, Austen's irony is on display from the novel's opening: "It is a truth universally acknowledged, that a single man in possession of a good fortune, must be

in Dickens? Why do they combine so well in a conversation, and draw one another out without seeming to do so, and never perform? The answer to the question can be put in several ways: that, unlike Dickens, she was a real artist, that she never stooped to caricature, etc. But the best reply is that her characters though smaller than his are more highly organized. They function all round All the Jane Austen characters are ready for an extended life, for a life which the scheme of her books seldom requires them to lead, and that is why they lead their actual lives so satisfactorily.

JAMES BOYD WHITE, *THE LEGAL IMAGINATION* 113-15 (abridged ed. 1985) (quoting FORSTER, *supra* note 1, ch. 4).

But Professor White also acknowledges that, for some critics, fictional "truth" falls far short of actual truth. He quotes Norman Douglas's essay on D.H. Lawrence, in which, according to Douglas, Lawrence fails to achieve truth because of his "novelist's touch":

What is this touch? It consists, I should say, in a failure to realize the profundities and complexities of the ordinary human mind; it selects for literary purposes two or three facets of a man or woman, generally the most spectacular and therefore "useful" ingredients of their character, and disregards all the others. . . . The facts may be correct so far as they go, but there are too few of them; what the author says may be true, and yet by no means the truth. That is the novelist's touch. It falsifies life.

Id. at 114-15 (quoting Norman Douglas, *A Plea for Better Manners*, in *EXPERIMENTS* (1925)). See also FRYE, *supra* note 3, at 305 ("The novelist deals with personality, with characters wearing their *personae* or social masks. He needs the framework of a stable society, and many of our best novelists have been conventional to the verge of fussiness.").

17. I recognize that this request is itself problematic since, even though we undoubtedly use our quotidian factfinding skills in our roles as jurors and adjudicators, there are, nevertheless, important differences in what we do as factfinders inside and outside a courtroom. As Professor Mueller explains:

Usually in everyday life we have an option not open to factfinders, which is to do nothing (reserving decision until matters seem more certain) or to change course when further information comes to light.

Second, few everyday decisions bear any resemblance to the decisions factfinders make in lawsuits. Rarely do ordinary people decide issues as momentous as whether large sums of money should change hands or someone should go to jail. Rarely do ordinary people choose between sharply disputed versions of facts and responsibility.

Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 383 (1992). Nevertheless, I hope that we can regard Austen's literary examination of quotidian factfinding as having some value for a society of potential jurors and those who must make the rules governing their conduct. Moreover, as among issues to be decided in the ordinary course of a nineteenth century upper middle-class life, the issues Austen presents to her protagonists—whom to choose as one's husband or wife—could hardly be more important.

in want of a wife."¹⁸ With such an opening, there can be little doubt that Austen intended her reader to be teased out of his customary passivity and engaged in the task of judging.¹⁹ Either the narrator is a fool and the opening is to be taken at face value, or the narrator is purposefully establishing a gulf between herself and those²⁰ who accept as a "truth, universally acknowledged" the above proposition. If the latter, then Austen's opening lines place the reader on notice that he must decide for himself which side of the gulf to be on as the story unfolds.

I. Demeanor and Hearsay Evidence

Central among its insights about modes of proof, and consistent with much contemporary social science research,²¹ *Pride and Prejudice* suggests to students of evidence that there may be little justification for the preference for live testimony as against hearsay.²² Instead, Austen's per-

18. AUSTEN, *supra* note 7, at 51.

19. Professor White notes, in his essay on Austen's *Emma*, that the novel "in some respects works directly on the reader, involving him or her immediately in distortion and misconception. To make one's way through it all, one must be constantly active and discriminating . . ." He suggests that Austen "can be said to make out of her inherited materials a moral language of extraordinary range, discrimination, and coherence and to teach her reader how to make it his own so that he may use it in his own life, as an instrument of perception and judgment." WHITE, *supra* note 16, at 163. Similarly, in *Pride and Prejudice*, Austen instructs the reader in what White terms her "moral language of extraordinary range, discrimination, and coherence," her "instrument of perception and judgment"—through observing the experiences of the characters whom Austen presents and comments upon. *Id.*

20. Certainly, characters like Mrs. Bennett do accept this "truth" and proceed to construct their plans upon it. They are for this reason subject to Austen's ridicule, an additional clue that she does not mean what she says.

21. See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078–88 (1991) (summarizing social science research on the capacity of individuals, acting like jurors, to discern veracity through demeanor clues); George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 578 (1997) ("There is little evidence that regular people do much better than chance at separating truth from lies. We tend to rely on worthless clues and misread others.") (citing authorities); H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 788–89 (1993) ("Many people (judges among them) devoutly believe—and the law encourages the belief—that mendacity is betrayed in involuntary, observable, signs of stress recognizable by anyone who has lived in contact with fellow humans through the ordinary experiences of life. All the evidence available—and it is a considerable quantity—is to the contrary. Much as we would like to affirm the utility of the hearsay principle and the Confrontation Clause, much as we (or some of us) feel in our guts that we know a liar when we see one, it would be foolish for the critical observer to repose much confidence in the revelations of live testimony."); Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & LAW 485, 485 (1999) (observing that "rules of evidence, including the hearsay rules, certainly lack any scientific basis; they derive from a set of behavioral assumptions, what one commentator has memorably called *fireside inductions*") (citing P.E. Meehl, *Law and the Fireside Inductions: Some Reflections of a Clinical Psychologist*, 27 J. SOC. ISSUES 65 (1971)).

22. That preferencing is manifested, *inter alia*, in the constitutionally guaranteed right of confrontation, U.S. CONST. amend. V; the right of cross-examination, *see* Davis v. Alaska, 415 U.S. 308, 316–17 (1974); the ban on hearsay, FED. R. EVID. 802; and the array of rules that give the jury primacy in de-

haps pivotal concern in the first half of the novel is with the mischief that we make for ourselves when we are excessively confident that we can judge a character by evaluating a person's own words and demeanor firsthand. She makes this point by the use of narrative counterpoint in the main and subplots: Elizabeth errs as to Darcy and Wickham, while Jane and Bingley know each other but err in deferring to the opinions of others. In this way, Austen works both ends of the factfinding equation, exploring the nature of the proof relied on as well as the quality of the factfinder's judgment. Hers is not a blanket condemnation of demeanor evidence as against hearsay, or of hearsay as against demeanor, but is instead a complex calibration of the intersection of these classes of proof with diverse characteristics of the factfinder.

A. THE FRAGILITY OF Demeanor EVIDENCE

The relationship between Elizabeth Bennett and Fitzwilliam Darcy at the centerpiece of the novel begins badly. The community of which Elizabeth is a member forms a preliminary judgment about Darcy at the first ball, after his and Bingley's arrival at Netherfield, and Elizabeth follows the pack. Austen tells us that Darcy

soon drew the attention of the room by his fine, tall person, handsome features, noble mien; and the report which was in general circulation within five minutes after his entrance, of his having ten thousand a year. The gentlemen pronounced him to be a fine figure of a man, the ladies declared he was much handsomer than Mr Bingley, and he was looked at with great admiration for about half the evening, till his manners gave a disgust which turned the tide of his popularity; for he was discovered to be proud, to be above his company, and above being pleased; and not all his large estate in Derbyshire could then save him

terminations of credibility. See *United States v. Scheffer*, 523 U.S. 303, 316–17 (1998) (rejecting defendant's contention that *Chambers v. Mississippi*, 410 U.S. 284 (1973), and the compulsory process clause guaranteed him the right to offer polygraph evidence); *Huddleston v. United States*, 485 U.S. 681, 690–91 (1988) (requiring that trial judge admit prior bad acts evidence so long as some reasonable juror could conclude that defendant had engaged in that prior conduct); see also McGough, *supra* note 21, at 485.

[T]he first principles of evidence include these assumptions: that accuracy of fact-finding is optimized by having the court or jury hear live testimony given by every witness under oath; that requiring eye-to-eye confrontation between adversaries deters perjury; that adversarial cross-examination reveals the falsities of any account as well as its frailties caused by malice or bias; that by observing a witness's demeanor while testifying—the body's language of gestures, twitches, hesitations, shifts, quiverings, quaverings—the judge or jury can discriminate between truthful and untruthful testimony. Collectively, the Anglo-American trial mode assumes that accuracy is optimized by having the court or jury hear live testimony by every witness.

Id.

from having a most forbidding, disagreeable countenance, and being unworthy to be compared with his friend.²³

The “manners” to which the narrator alludes above, which provoke such an instantaneous reassessment of Darcy, are his refusal to dance or converse with any of the assembly other than his own party.²⁴ As a result, Austen tells us, “[Darcy’s] character was decided. He was the proudest, most disagreeable man in the world, and everybody hoped that he would never come there again.”²⁵ Having already shown us her capacity for irony, Austen’s use of the passive voice invites a response that is contingent on the level of irony which the reader brings to it: A superficial judge accepts this absolute “decision” as to Darcy’s character, while a reader ready to be engaged as an independent factfinder might suspect that such a decision is, by its very certitude, suspect.²⁶

With respect to Elizabeth in particular, Darcy gives special offense, in a frank conversation with Bingley that Elizabeth is near enough to overhear. Bingley coaxes Darcy to dance, but he refuses, saying “[a]t such an assembly as this, it would be insupportable. Your sisters are engaged, and there is not another woman in the room, whom it would not be a punishment to me to stand up with.”²⁷ When Bingley directs Darcy’s attention to Elizabeth, Darcy “coldly” replies, “[s]he is tolerable; but not

23. AUSTEN, *supra* note 7, at 58.

24. *Id.* Austen contrasts this behavior with that of Bingley, who is described as being “lively and unreserved, danced every dance, and was angry that the ball closed so early, and talked of giving one himself at Netherfield.” *Id.*

25. *Id.*

26. The range of reader responses to such proof parallels those of the central characters. The superficial factfinder is perhaps best exemplified by Mrs. Bennett, who quickly reaches judgments based upon the most inane of proofs, is slow to reconsider or retract those judgments, and is herself made ridiculous by such conduct. *See id.* at 167 (describing Mrs. Bennett’s reaction to the news that Mr. Collins is to wed Charlotte: “In the first place, she persisted in disbelieving the whole of the matter; secondly, she was very sure that Mr Collins had been taken in; thirdly, she trusted that they would never be happy together; and fourthly, that the match might be broken off.”). A reader like Mrs. Bennett might accept this “decision” about Darcy and, like Mrs. Bennett, be wholly surprised by a reassessment of his character later in the novel. *See id.* at 386 (Mrs. Bennett’s reaction to learning that Elizabeth was to wed Darcy: “I am so pleased—so happy. Such a charming man!—so handsome! so tall!—Oh, my dear Lizzy! pray apologize for my having disliked him so much before. I hope he will overlook it.”). Although her assessment is based on more reliable proofs, a more critical factfinder like Elizabeth is nevertheless deeply affected by her own initial assessment of Darcy. So, a reader like Elizabeth might want more proof than that offered by Darcy’s conduct at the assembly, and might reserve certitude until such proof were offered. Jane alone is unwilling to adopt the “decision” of the community at large, preferring to be guided by a deep presumption as to the goodness of others. *See infra* text accompanying notes 63–71. A reader like Jane might maintain a kind of presumption of innocence about Darcy that would likely resist the trivial proof set out above.

This correspondence between reader and character as to factfinding strengths and weaknesses can also be found between reader and juror.

27. AUSTEN, *supra* note 7, at 59.

handsome enough to tempt *me*; and I am in no humor at present to give consequence to young ladies who are slighted by other men.”²⁸ As a result of these firsthand, albeit covert, observations, Elizabeth “remained with no very cordial feelings toward” Darcy.²⁹

The judgments formed by both Elizabeth and the larger community are predicated on personal observation of Darcy’s statements and accompanying conduct, including tone, demeanor,³⁰ and gesture. In an adjudicatory context, we might label Darcy the declarant.³¹ Such proof is given primacy in the Federal Rules through the ban on hearsay,³² and is generally deemed to be worthy of a factfinder’s reliance.³³ As is set out more fully below, however, this preference for firsthand evidence, as against hearsay, is not supported by the novel. Indeed, it is this very preference for firsthand evidence over hearsay that drives the narrative by producing the distorted judgments that must later be unraveled.

Even in the brief passage above, Austen warns us of the deceptively suasive power of demeanor evidence, by juxtaposing antithetical interpretations of Darcy’s appearance and manner to support the shifting judgments of the community. Darcy is first seen as a “fine figure of a man,” whom “the ladies declared . . . was much handsomer than Mr Bingley,” and who “was looked at with great admiration for about half

28. *Id.*

29. *Id.*

30. “Demeanor” is said to embrace

the tone of voice in which a witness’s statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expressions, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.

Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 2 (2000) (quoting BLACK’S LAW DICTIONARY 430 (6th ed. 1990)).

31. Fed. R. Evid. 801(b) defines a “declarant” as “a person who makes a statement.”

32. Fed. R. Evid. 802 provides that “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Fed. R. Evid. 801(c) defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

33. Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 334 (1961) (“[L]awyers assume that the ability of the trier [of fact] to assess credibility is greater when he can observe demeanor and reaction to cross-examination.”). Weinstein goes on to state that “[e]ven if this assumption is not subject to proof by acceptable psychological tests and theory, it is shared by jurors and it seems to accord with our common experience.” *Id.* at 335 (citing Lawrence S. Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59, 72–75 (1959)); see also Mueller, *supra* note 17, at 392 (“[b]ecause all agree that live testimony is preferable to remote statements, the preference is self-executing to some extent”). It is this understanding of jurors’ “common experience” that Austen’s work amplifies.

the evening."³⁴ But by later that same evening, "not all his large estate in Derbyshire could then save him from having a most forbidding, disagreeable countenance, and being unworthy to be compared with his friend."³⁵ Plainly, since Darcy cannot actually have changed in appearance in those few hours, the difference in significance accorded his countenance by the factfinders of Meryton must be attributable to some other factor. In this way, Austen flags for the reader the convenient malleability of demeanor evidence, and the grave temptation to factfinders of all levels of skill to construe demeanor as demonstrating a conclusion to which they are already bound for other reasons.³⁶ As a literary insight, this use of irony gives pleasure to the reader, and as a legal insight it demonstrates a sophistication that has often eluded lawyers, legislators, and judges.

Perhaps the most significant evidence in Elizabeth's adjudication of Darcy's character is the information that she learns, firsthand, from Mr. Wickham, a newly commissioned officer in the regiment stationed at Meryton. Although their acquaintance is very slight, Wickham details to Elizabeth his past connection to Darcy, telling her that he has "no reason for avoiding [Darcy] but what I might proclaim to all the world; a sense of very great ill usage, and most painful regrets at his being what he is."³⁷ Wickham continues that he

can never be in company with this Mr Darcy without being grieved to the soul by a thousand tender recollections. His behavior to myself has been scandalous; but I verily believe I could forgive him any thing and every thing, rather than his disappointing the hopes and disgracing the memory of his father.³⁸

Wickham then recounts to Elizabeth events in his own past that led him into military life, claiming to have been denied by Darcy the living of a parish that the elder Mr. Darcy had bequeathed him.³⁹

Elizabeth, who prides herself on her own skill in assessing character, is taken in.⁴⁰ By the conclusion of Wickham's narrative she has reached her verdict on Darcy:

34. AUSTEN, *supra* note 7, at 58.

35. *Id.*

36. See Wellborn, *supra* note 21, at 1078–88 (summarizing studies that purport to identify those traits that are reliable predictors of veracity).

37. AUSTEN, *supra* note 7, at 122.

38. *Id.*

39. *Id.* at 122–23.

40. Elizabeth laments later when Darcy reveals her errors:

"How despicably have I acted!" she cried.—"I, who have prided myself on my discernment!—I, who have valued myself on my abilities! who have often disdained the generous candour of my sister, and gratified my vanity, in useless or blameable distrust. . . . Had I

I had not thought Mr Darcy so bad as this—though I have never liked him, I had not thought so very ill of him—I had supposed him to be despising his fellow-creatures in general, but did not suspect him of descending to such malicious revenge, such injustice, such inhumanity as this!⁴¹

Her conclusions are based upon her assessment of everything that the rules suggest is central to weighing credibility: it is just that she gets it all wrong.⁴²

Elizabeth consistently affirms her judgments of Wickham's and Darcy's relative worth by reference to their demeanors. She muses, during Wickham's narrative, "[a] young man, too, like *you*, whose very countenance may vouch for your being amiable."⁴³ When she recounts Wickham's tale to Jane, she says "there was truth in his looks."⁴⁴ And later, when she learns of Darcy's version of events, she reflects that "[a]s to [Wickham's] real character, had information been in her power, she had never felt a wish of enquiring. His countenance, voice, and manner, had established him at once in the possession of every virtue."⁴⁵ Just as contemporary social science concludes, her capacity to draw inferences about credibility from these superficial observations is very poor.⁴⁶

been in love, I could not have been more wretchedly blind. But vanity, not love, has been my folly."

Id. at 236. Elizabeth's attitude in this respect is part of the "pride" adverted to in the novel's title.

41. *Id.* at 123–24.

42. Elizabeth's interview with Wickham allows her free range for cross-examination, and she takes advantage of it, peppering Wickham with questions throughout his narrative. *Id.* at 123–25 ("[B]ut how could *that* be?—How could his will be disregarded?—Why did you not seek legal redress?"); *id.* at 123 ("‘But what,’ said she, after a pause, ‘can have been his motive?—what can have induced him to behave so cruelly?’"); *id.* at 125 ("Can such an abominable pride as his have ever done him good?"); *id.* ("What sort of a girl is Miss Darcy?"); *id.* ("How can Mr Bingley, who seems good humour itself, and is, I really believe, truly amiable, be in friendship with such a man? How can they suit each other?—Do you know Mr Bingley?"). Indeed, her probing questions suggest that she is perhaps more like a juror than the ordinary factfinder. See Mueller, *supra* note 17, at 407 n.119 ("[T]he trial process invites testing and probing that people do not pursue in their daily lives, particularly where the matters under discussion do not directly affect them.").

43. AUSTEN, *supra* note 7, at 124.

44. *Id.* at 128.

45. *Id.* at 234. Aunt Gardiner, who in some ways stands for trustworthiness or good judgment, falls victim to this same set of assessment tools, saying of Darcy:

I really should not have thought that he could have behaved in so cruel a way by any body, as he has done by poor Wickham. He has not an ill-natured look. On the contrary, there is something pleasing about his mouth when he speaks. And there is something of dignity in his countenance, that would not give one an unfavorable idea of his heart.

Id. at 278.

46. Social science research has confirmed the tendency, to which Austen alludes here, of people to treat those who are physically attractive better than those who are less so, in assessing not only their credibility but also their culpability. See Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated*

Elizabeth's failure to expose Wickham's deceit in this encounter, despite the opportunity to examine his testimonial capacities, suggests that the contemporary confidence in the capacity of jurors to act as "lie detectors" is misplaced. Indeed, when at last the truth is revealed to Elizabeth, she realizes, in hindsight, how inappropriate it was of Wickham to have disclosed such intimate facts about his relation with the Darcy family on so slight an acquaintance with her. Austen explains:

She was *now* struck with the impropriety of such communications to a stranger and wondered it had escaped her before. She saw the indelicacy of putting himself forward as he had done, and the inconsistency of his profession with his conduct. She remembered that he had boasted of having no fear of seeing Mr Darcy—that Mr Darcy might leave the country but that *he* should stand his ground; yet he had avoided the Netherfield ball the very next week.⁴⁷

This breach of decorum should have been a clue for Elizabeth as factfinder, but her reliance on demeanor (Wickham's charm) undercuts her capacity to apply such assessment tools to reveal bias on the witness's part.⁴⁸

In the analogy between this quotidian factfinding and the adjudicatory factfinding of a jury, one flaw noted by those evidence scholars attempting to apply controlled experiments on lie detection to the trial process is absent. It has been observed that such controlled studies can never accurately gauge jurors' capacity to identify truthful witnesses because experimental subjects lack a sufficient motivation to be perceived as truthful, whereas testifying witnesses often possess such motivation.⁴⁹

Jury Task, 8 J. RES. PERSONALITY 45, 45 (1974); Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410, 410 (1975) (finding that both men and women are more likely to give lenient treatment to attractive defendants), cited in Marder, Note, *supra* note 13, at 594 n.5. There is, however, empirical support for the proposition that attractiveness of a witness does not affect credibility except where the factfinder is "not highly motivated." Mueller, *supra* note 17, at 379 ("[m]otivation apparently affects the ability to evaluate conflicting evidence and to overcome distractions from affective reactions and the way evidence is packaged") (citing RICHARD E. PETTY & JOHN T. CACIOPPO, COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE 205 (1986)).

47. AUSTEN, *supra* note 7, at 235.

48. More cynically, the recognition of jurors' incapacity to discern truthspeakers from liars has been described as an open secret. See Fisher, *supra* note 21, at 706–07 (suggesting that the "inexorable flow of factfinding power to the jury was due, finally, to the jury's capacity to erase all blemishes" and that the "black box" of jury deliberations "serves as the great procedural opiate, which draws the curtain upon human errors and soothes us in the assurance that we have attained the unattainable") (quoting Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 262 (1920)).

49. See Fisher, *supra* note 21, at 707 n.606 (noting that a "far greater flaw of these studies is that they fail to replicate with any realism the trial witness's intense interest in being believed") (citing Mark Gregory Frank, *Human Lie Detection Ability as a Function of the Liar's Motivation* 1 (1989) (unpublished Ph.D. dissertation, Cornell University)).

Here, in narrating his mistreatment at the hands of Darcy, Wickham seems every bit as motivated as the witness in a serious civil or criminal case might be. Perhaps this factor, rather than Wickham's good looks or Elizabeth's own qualities as a factfinder, tips the balance in her perception of the truth of those past events.

As for Jane, her feelings for Bingley are genuine and strong from their first meeting, and her impression of his feelings for her is that they are of the same kind. Both Jane and Bingley, as factfinders, rely on their own perceptions of the demeanor cues of their counterparts, and both are right.⁵⁰ Nevertheless, each is persuaded by the influence of others that his or her own judgments are without foundation. Thus, Austen poses a counterpoint to Elizabeth and Darcy's errors by showing that demeanor cues can sometimes be read correctly, yet the reader of such cues can nevertheless err in her factfinding by refusing to value her own perceptions as against those of others.

Darcy—with his own bias against the Bennett family in full play—assures Bingley that Jane has no feelings for him. But, like Jane, rather than relying on his own observations of Jane's demeanor, Bingley chooses to credit Darcy and his sister, Caroline, and so does not pursue Jane for many months. As Darcy later explains to Elizabeth, “[Bingley] had before believed [Jane] to return his affection with sincere, if not with equal regard.—But Bingley has great natural modesty, with a stronger dependence on my judgment than on his own.—To convince him, therefore, that he had deceived himself, was no very difficult point.”⁵¹ Bingley is, according to Darcy, “most unaffectedly modest. His diffidence had prevented his depending on his own judgment in so anxious a case, but his reliance on mine, made everything easy.”⁵²

Conversely, Darcy is, like Elizabeth, all certainty in his judgments when he writes to Elizabeth that

50. As to the accuracy of Bingley's and Jane's perceptions, it was amply corroborated by the perceptions of others. AUSTEN, *supra* note 7, at 227–28 (Darcy explaining that he “had not been long in Hertfordshire, before I saw, in common with others, that Bingley preferred your eldest sister, to any other young woman in the country,” and describing the degree of Bingley's attachment to Jane as a “partiality . . . beyond what I had ever witnessed in him”). Darcy also tells Elizabeth that “[a]t th[e] Netherfield ball, while I had the honour of dancing with you, I was first made acquainted, by Sir William Lucas's accidental information, that Bingley's attentions to your sister had given rise to a general expectation of their marriage. He spoke of it as a certain event, of which the time alone could be undecided.” *Id.*

51. *Id.* at 229. Perhaps it is no more than the ordinary self-doubt of a lover wondering whether his feelings are returned by his object, but perhaps it is a trait of character, as described below, that fundamentally affects his capacity as a factfinder.

52. *Id.* at 379 (Darcy to Elizabeth after Jane and Bingley, and Elizabeth and Darcy, have become engaged).

I had not been long in Hertfordshire, before I saw, in common with others, that Bingley preferred your eldest sister, to any other young woman in the country.—But it was not till the evening of the dance at Netherfield that I had any apprehension of his feeling a serious attachment.—I had often seen him in love before. . . . I observed my friend's behaviour attentively; and I could then perceive that his partiality for Miss Bennett was beyond what I had ever witnessed in him. Your sister I also watched.—Her look and manners were open, cheerful and engaging as ever, but without any symptom of peculiar regard, and I remained convinced from the evening's scrutiny, that though she received his attentions with pleasure, she did not invite them by any participation of sentiment.⁵³

Darcy reaffirms his belief when he confesses his machinations in “pointing out” the “certain evils” of a match with Jane, saying, “I do not suppose that it would ultimately have prevented the marriage, had it not been seconded by the assurance which I hesitated not in giving, of your sister's indifference.”⁵⁴

Indeed, Darcy persists until the very end of the novel that he did not believe Jane to be attached to Bingley, grudgingly acknowledging that he was wrong, although never recognizing that his own bias against the match probably distorted his perception of Jane's (and Bingley's) demeanors.⁵⁵ But for Bingley, Jane is the out-of-court declarant and Darcy

53. *Id.* at 227–28. As Darcy continues, even his effort to acknowledge that he might be in error is padded with swagger, “If *you* have not been mistaken here, I must have been in an error. Your superior knowledge of your sister must make the latter probable.—If it be so, if I have been misled by such error, to inflict pain on her, your resentment has not been unreasonable. But I shall not scruple to assert, that the serenity of your sister's countenance and air was such as might have given the most acute observer, a conviction that, however amiable her temper, her heart was not likely to be easily touched.” *Id.*

54. *Id.* at 229.

55. Demonstrating some of his pride and prejudice, Darcy refuses even to acknowledge that he *could* be biased in his perceptions, let alone that he was on that occasion. *Id.* at 228 (“That I was desirous of believing her indifferent is certain,—but I will venture to say that my investigations and decisions are not usually influenced by my hopes or fears.—I did not believe her to be indifferent because I wished it;—I believed it on impartial conviction, as truly as I wished it in reason.”) And when Darcy says of Jane and Bingley's engagement that he was not surprised, but rather felt “that it would soon happen,” Elizabeth teasingly replies: “That is to say, you had given your permission.” Austen adds: “And though he exclaimed at the term; she found that it had been pretty much the case.” *Id.* at 379. Darcy confesses that

“On the evening before my going to London,” said he, “I made a confession to [Bingley], which I believe I ought to have made long ago. I told him of all that had occurred to make my former interference in his affairs, absurd and impertinent. His surprise was great. He had never had the slightest suspicion. I told him, moreover, that I believed myself mistaken in supposing, as I had done, that your sister was indifferent to him; and as I could easily perceive that his attachment to her was unabated, I felt no doubt of their happiness together.”

Id. Indeed, even at the novel's close, Darcy continues to be excessively confident of his own judgment as to Jane's demeanor, relying on it over and above Elizabeth's far deeper knowledge of her sister. When Elizabeth asks Darcy, “Did you speak from your own observation . . . when you told him that

is the testifying witness, and Bingley's reliance on the hearsay proves unwarranted and, for a time, costly.

B. THE ROLE OF CERTAINTY AND SIMPLICITY IN ASSESSING DEMEANOR EVIDENCE

Although our adjudicatory rules presume that it is the nature of the evidence itself—hearsay or not—that determines the validity of the judgment reached by a factfinder, Austen's conclusions in this area are quite different. For Austen, the nature of the evidence does not determine the likelihood of an accurate judgment. Instead, Austen suggests that there are variables associated with the factfinder that make evidence reliable or misleading, irrespective of its hearsay nature. These variables seem to be the certitude and the essential simplicity of the factfinder.

As these two plot strands involving Jane and Elizabeth unravel, it appears, somewhat counterintuitively, that the probability of error resulting from reliance on demeanor evidence *increases* with the factfinder's certitude as to her own skill.⁵⁶ Where Elizabeth is fixed in her conclusions as to Darcy, based on personal interviews with both him and Wickham, Jane and Bingley are deceived not by their own assessment of the others' demeanor, but by reliance on hearsay—the statements of people other than the declarant offered for the truth of the matter asserted therein—that contradicts their own impressions of each other.⁵⁷ These naives defer to the judgments of others—the testifying witnesses, in this construction—rather than relying on their own capacities to observe and judge one another's feelings.

Where Elizabeth is certain as to Wickham's and Darcy's natures, Jane's assessment of the character and conduct of others, including Bingley's regard for her, is tentative and dubious. This apposition is well illustrated during the intimate conversation between the sisters, when

my sister loved him, or merely from my information last spring?," he replies, "From the former. I had narrowly observed her during the two visits which I had lately made her here; and I was convinced of her affection." *Id.* at 379. Elizabeth uses the word "merely" to describe and discount her own account of Jane's feelings, unless Austen intends this to be another in a series of ironic tweaks of Darcy's arrogance in which Elizabeth indulges in this scene.

56. The confident Elizabeth may be more like the typical juror than the tentative Jane. See Fisher, *supra* note 21, at 706 ("Not only do experimental subjects rarely perform much better than chance at distinguishing truth from falsehood, but they think they are better lie detectors than they are.") (citing Wellborn, *supra* note 21, at 1082–88 (summarizing studies)).

57. This compatibility is, ultimately, one of the strengths of their relationship. As Elizabeth observes when at last Bingley and Jane are engaged, she "really believed all his expectations of felicity, to be rationally founded, because they had for basis the excellent understanding, and super-excellent disposition of Jane, and a general similarity of feeling and taste between her and himself." AUSTEN, *supra* note 7, at 357.

Elizabeth tells Jane of her conversation with Wickham. Jane says, "It is difficult indeed—it is distressing.—One does not know what to think." Elizabeth immediately replies: "I beg your pardon;—one knows exactly what to think."⁵⁸ Hers is a certitude that borders on arrogance, and Austen's title suggests it is rooted in pride and operates so automatically and absolutely as to amount to prejudice.

It is only at the close of the novel, when she tells her father of her engagement to Darcy and he responds with great surprise and concern,⁵⁹ that Elizabeth chides herself for this certitude, and for the excessive freedom she had shown in expressing her strong opinions:

How earnestly did she then wish that her former opinions had been more reasonable, her expressions more moderate! It would have spared her from explanations and professions which it was exceedingly awkward to give; but they were not necessary, and she assured him with some confusion, of her attachment to Mr Darcy.⁶⁰

Jane, by contrast, consistently dismisses her own perceptions of Bingley's regard as inaccurate right up until the novel's close. As late as chapter fifty-four, when Bingley finally returns to the neighborhood of Meryton and meets Jane after a long absence, she tells Elizabeth: "I have now learnt to enjoy his conversation as an agreeable and sensible young man, without having a wish beyond it. I am perfectly satisfied from what his manners now are, that he never had any design of engaging my affection."⁶¹ When Elizabeth presses her and teases her about the inaccuracy of those impressions, she replies: "How hard it is in some cases to be believed!"⁶²

This contrast in character between Elizabeth and Jane is drawn with consistency throughout the novel, and is duplicated in the brotherly friendship between Darcy and Bingley. It signals a corresponding difference in approach to factfinding that may be of more use in developing

58. *Id.* at 129. This certainty is a quality which Darcy notes early on and which becomes the subject of some teasing. While visiting with the Bingleys during Jane's illness, Elizabeth says to Darcy, "[W]e are each of an unsocial, taciturn disposition, unwilling to speak, unless we expect to say something that will amaze the whole room, and be handed down to posterity with all the eclat of a proverb." Darcy replies, "This is no very striking resemblance of your own character, I am sure," said he. "How near it may be to *mine*, I cannot pretend to say.—*You* think it a faithful portrait undoubtedly." *Id.* at 134.

59. *Id.* at 384 ("Her father was walking about the room, looking grave and anxious. 'Lizzy,' said he, 'what are you doing? Are you out of your senses, to be accepting this man? Have not you always hated him?'").

60. *Id.*

61. *Id.* at 352.

62. *Id.* at 353.

rules of evidence than the present emphasis on demeanor and bias against hearsay.

The second variable upon which the probability of an erroneous judgment seems to turn for Austen is the essential simplicity or cynicism of the factfinder. Where Elizabeth is eager to root out unkindness or duplicity, and is correspondingly deceived in her judgments of Wickham and Darcy, Jane and Bingley are each predisposed to take people as they find them but are, ironically, less likely to be governed by their own impressions, even where they are accurate. For instance, when Elizabeth learns that Bingley is settled in London and is not returning to court her sister, the narrator observes:

That he was really fond of Jane, she [Elizabeth] doubted no more than she had ever done; and as much as she had always been disposed to him, she could not think without anger, hardly without contempt, on that easiness of temper, that want of proper resolution, which now made him the slave of his designing friends, and led him to sacrifice his own happiness to the caprice of their inclinations.⁶³

Austen juxtaposes Elizabeth's nature with that of Jane in this respect, when the sisters converse about Jane's disappointment. Jane begins:

"I have this comfort immediately, that it has not been more than an error of fancy on my side, and that it has done no harm to anyone but myself."

"My dear Jane," exclaimed Elizabeth, "you are too good. Your sweetness and disinterestedness are really angelic; I do not know what to say to you. I feel as if I had never done you justice, or loved you as you deserve."

Miss Bennett eagerly disclaimed all extraordinary merit, and threw back the praise on her sister's warm affection.

"Nay," said Elizabeth, "this is not fair." You wish to think all the world respectable, and are hurt if I speak ill of anybody. I only want to think you perfect, and you set yourself against it. . . . There are few people whom I really love, and still fewer of whom I think well. The more I see of the world, the more I am dissatisfied with it; and every day confirms my belief of the inconsistency of all human characters, and of the little dependence that can be placed on the appearance of either merit or sense."⁶⁴

63. *Id.* at 172. So condemnatory is Elizabeth, by contrast, that she is able to see Bingley's goodness as flaw in itself, as to which she cannot "think without anger." *Id.*

64. *Id.* at 173-74.

Accordingly, as wrong as she is about Wickham and Darcy, it is Elizabeth who recognizes Caroline Bingley as a schemer plotting to secure her brother a better connection than Jane Bennett.

Jane, by contrast, can see no guile or bias in Miss Bingley's letter, and doubts, instead, her own impressions of Bingley's feelings for her. She tells her sister:

"Beyond a doubt, they *do* wish him to chuse Miss Darcy," replied Jane; "but this may be from better feelings than you are supposing. They have known her much longer than they have known me; no wonder if they love her better. But, whatever may be their own wishes, it is very unlikely they should have opposed their brother's. What sister would think herself at liberty to do it, unless there were something very objectionable? If they believed him attached to me, they would not try to part us; if he were so, they could not succeed. By supposing such an affection, you make every body acting unnaturally and wrong, and me most unhappy. Do not distress me by the idea. I am not ashamed of having been mistaken—or, at least, it is slight, it is nothing in comparison of what I should feel in thinking ill of him or his sisters. Let me take it in the best light, in the light in which it may be understood."⁶⁵

Even when Jane does come to see Miss Bingley in a different light, she attributes it to a change in Miss Bingley, rather than in her own capacity to see negative qualities in others. She writes to Elizabeth from London, "I confess myself to have been entirely deceived in Miss Bingley's regard for me. But, my dear sister, though the event has proved you right, do not think me obstinate if I still assert, that, considering what her behaviour was, my confidence was as natural as your suspicion."⁶⁶ She describes Miss Bingley as "in every respect so altered a creature" from her early behavior, and tentatively suggests, "I cannot understand it. If I were not afraid of judging harshly, I should almost be tempted to say, that there is strong appearance of duplicity in all this."⁶⁷

Elizabeth condemns Darcy, while Jane

was the only creature who could suppose there might be any extenuating circumstances in the case, unknown to the society of Hertfordshire; her mild and steady candor always pleaded for allowances, and urged the possibility of mistakes—but by everybody else Mr Darcy was condemned as the worst of men.⁶⁸

65. *Id.* at 175.

66. *Id.* at 184.

67. *Id.* at 184–85.

68. *Id.* at 176.

Similarly, when Jane is told of Wickham's story,

she knew not how to believe that Mr Darcy could be so unworthy of Mr Bingley's regard; and yet, it was not in her nature to question the veracity of a young man of such amiable appearance as Wickham.— The possibility of his having really endured such unkindness, was enough to interest all her tender feelings; and nothing therefore remained to be done, but to think well of them both, to defend the conduct of each, and throw into the account of accident or mistake, whatever could not be otherwise explained.⁶⁹

Later, when Jane learns of Wickham's past misdeeds, she again resists condemning him. Austen writes:

What a stroke was this for poor Jane! who would willingly have gone through the world without believing that so much wickedness existed in the whole race of mankind, as was here collected in one individual. Nor was Darcy's vindication, though grateful to her feelings, capable of consoling her for such discovery. Most earnestly did she labour to prove the probability of error, and seek to clear one, without involving the other.⁷⁰

Finally, when Lydia runs off with Wickham, Jane again resists passing judgment. "But you see that Jane," said her aunt, "does not think so ill of Wickham, as to believe him capable of the attempt." "Of whom does Jane ever think ill?" replies Elizabeth.⁷¹

As is set out more fully above,⁷² the characters of Darcy and Bingley are placed in a counterpoint similar to that between Elizabeth and Jane. Austen explains that between Bingley and Darcy

there was a very steady friendship, in spite of a great opposition of character.— Bingley was endeared to Darcy by the easiness, openness, ductility of his temper, though no disposition could offer a greater contrast to his own, and though with his own he never appeared dissatisfied.⁷³

Darcy is as confident of his judgments as Elizabeth, conceding only at the end of the novel that he might have been wrong about Jane's feelings for Bingley. At one point early in the novel, he brags to Elizabeth that

I have faults enough, but they are not, I hope, of understanding. My temper I dare not vouch for.—It is I believe too little yielding—

69. *Id.* at 128. Here Jane not only judges this hearsay report by her own simplicity of nature but is ready to defer to Bingley's judgment of Darcy's character as a proxy for the truth.

70. *Id.* at 251.

71. *Id.* at 300–01.

72. See *supra* text accompanying notes 52–57 (describing Darcy's overconfidence in his own judgment and Bingley's willingness to defer to the judgment of others).

73. *Id.* at 64.

certainly too little for the convenience of the world. I cannot forget the follies and vices of others so soon as I ought, nor their offences against myself. . . . My good opinion once lost is lost for ever.⁷⁴

Like Elizabeth's, his certitude is to be an obstacle to the accurate assessment of others, including Elizabeth, Jane, and Bingley.

C. THE UNEXPECTED RELIABILITY OF HEARSAY

It is not until the second half of the novel that Elizabeth allows the opinions and reports of others, i.e., hearsay, to unseat her own factual determinations about both men.⁷⁵ For Austen, hearsay is, on significant occasions, not merely the equivalent of firsthand testimony, but even its superior for accuracy and reliability. It has particular reliability where the factfinder is, like Elizabeth and Darcy, overconfident to the point of prejudice. And yet, at the same time it poses particular dangers to a factfinder who, like Jane, is easily swayed by the opinions of others. Just as hearsay reveals Elizabeth's errors in assessment of demeanor and advances the goal of truthseeking as to Darcy and Wickham's natures, it is also the undoing of Jane and Bingley's correctly intuited judgments of each other.⁷⁶ Austen, then, recognizes the pitfalls of hearsay testimony.

It is Miss Bingley's letter to Jane that persuades Jane that Bingley has no feelings for her. Miss Bingley is engaged in purposeful distortion when she writes to Jane that

My brother admires [Georgiana Darcy] greatly already; he will have frequent opportunity now of seeing her on the most intimate footing; her relations all wish the connection as much as his own; and a sister's

74. *Id.* at 102.

75. Elizabeth's reassessment of each man begins with Darcy's letter to her following her refusal of his first marriage proposal, *id.* at 227–32, and is later supplemented by the testimonies of others, including the housekeeper at Pemberly, *id.* at 269–72, and her own sister Jane. After leaving Pemberly, Elisabeth's thoughts were described in this manner:

The respect created by the conviction of his [Darcy's] valuable qualities, though at first unwillingly admitted, had for some time ceased to be repugnant to her feelings; and it was now heightened into somewhat of a friendlier nature, by the testimony so highly in his favour, and bringing forward his disposition in so amiable a light, which yesterday had produced.

Id. at 284. She is also influenced by her uncle's report of Darcy's conduct in the matter of Lydia and Wickham's elopement, which conduct includes some statements of Darcy's that would, through Uncle Gardiner, be hearsay.

The rules of evidence currently in use do recognize reputation as to character—the agglomeration of hearsay that is reported within a recognizable community—as an exception to the usual ban on hearsay. FED. R. EVID. 803(21). Accordingly, even under current rules, the housekeeper's comments on Darcy's good character could appropriately be offered.

76. So, Jane is easily dissuaded from her initial confidence in Bingley's feelings for her by the rank hearsay of his sister's letter after leaving Netherfield, in which Miss Bingley praises Georgiana Darcy. AUSTEN, *supra* note 7, at 158–59.

partiality is not misleading me, I think, when I call Charles most capable of engaging any woman's heart.⁷⁷

Here, Miss Bingley, standing in the role of the testifying witness, purports to repeat to us the feelings and perceptions of Bingley, the out of court declarant.⁷⁸ But since Jane has no access to Bingley himself, she has no way of determining the accuracy of Miss Bingley's report.

We do however, have access to Miss Bingley's bias as well as her character for credibility. Through Elizabeth, we see the "ladies of Longbourn," Caroline and her sister, as "supercilious in their treatment of every body, hardly excepting even her sister."⁷⁹ And Elizabeth uses her own opinion as to Miss Bingley's credibility to dismiss her account of Bingley's feelings, preferring to rely on her own, accurate, observations of Bingley himself.

Thus, Austen offers conflicting depictions of what may be done with hearsay, depending on the character of the factfinder. A credulous or unsophisticated factfinder may rely on the hearsay to her detriment, while a more sophisticated factfinder might reject the evidence as tainted by its hearsay character and by the credibility or character of the testifying witness.

One last example reveals Austen's pleasure in manipulating conflicting modes of proof. When Colonel Fitzwilliam, Georgiana Darcy's cousin and second guardian, is strolling in the park with Elizabeth and tells her of how Darcy "congratulated himself on having lately saved a friend from the inconveniences of a most imprudent marriage,"⁸⁰ Elizabeth recognizes the account as that of Jane and Bingley, and also recognizes, with anger, the ignoble role that Darcy has played in "destroying the happiness of a beloved sister."⁸¹ Because of her prior knowledge, Elizabeth is able to see failure where Fitzwilliam sees success, but for Elizabeth the factfinder, it is Fitzwilliam who is the testifying witness and Darcy who, as the out-of-court declarant, is in need of a thorough cross-

77. *Id.* Jane interprets the letter with characteristic credulity, saying to Elizabeth:

Is it not clear enough?—Does it not expressly declare that Caroline [Bingley] neither expects nor wishes me to be her sister; that she is perfectly convinced of her brother's indifference, and that if she suspects the nature of my feelings for him, she means (most kindly!) to put me on my guard? Can there be any other opinion on the subject?

Id. at 159.

78. The statement of Miss Bingley that her brother "admires" Georgiana "greatly already" implies a communication of some kind from Bingley to his sister, which might be regarded by the Rules of Evidence as a statement or as conduct intended as a statement, such that it would be within the reach of the hearsay ban.

79. *Id.* at 68.

80. *Id.* at 217-18.

81. *Id.* at 222.

examination. Fitzwilliam's narrative is full of vagueness and paraphrases—"there were some very strong objections against the lady," he says.⁸² Elizabeth ably cross-examines Fitzwilliam, filling the gaps with information to which she has access outside the record, information which an ordinary juror would not have.

D. APPLYING AUSTEN'S INSIGHTS TO ADJUDICATION

How might jury trials be altered were we to take into account the variables identified by Austen in *Pride and Prejudice* when assessing hearsay as against live testimony? Austen's account would suggest that the value of these proofs turns not on the differences, catalogued by scholars, between live testimony and hearsay, or the circumstances surrounding the hearsay statement,⁸³ but instead on the nature of the factfinders who hear and weigh them. For a person of Elizabeth's confident certitude—even prejudice—demeanor evidence is deceptive, while hearsay's pitfalls are easily uncovered. Such a factfinder does not require rules of exclusion to keep her from being the victim of unreliable proofs; on the contrary, she needs to be told when to relinquish her own confident conclusions in favor of the judgments of others.⁸⁴ For an innocent and tentative factfinder like Jane, the opposite is true—she requires protection from hearsay because she is not able to sift its distorting possibilities through skeptical faculties. Yet, she makes too little of her own discernment of character and credibility when it comes to live witnesses, like Bingley, whose intentions and meanings she read quite accurately but discarded too quickly.

It is difficult if not impossible to identify factfinders' degree of either certitude or simplicity, whether prior to, during, or after, the taking of evidence.⁸⁵ How then can these variables play any role in the methods used by courts to treat hearsay or demeanor evidence?

If, as Austen suggests through her novel, the utility of demeanor evidence is inversely related to the certitude of the factfinder, then the pos-

82. *Id.* at 219.

83. See FED. R. EVID. 803 (catalogue of exceptions to hearsay rule).

84. This is in accord with the model that some evidence scholars envision for hearsay rules. See, e.g., Weinstein, *supra* note 33, at 335 (noting that triers of fact feel more assurance that they can arrive at the truth if they can assess the demeanor of a witness, but that "[a]ssurance of the trier, however, dictates only a rule of preference, not of exclusion" and that "the risks in using hearsay are exaggerated because the trier tends to recognize the difficulty in evaluating the probative force of hearsay and does not rely heavily upon it when he is aware that it is hearsay").

85. One partial solution might be to encourage or even mandate more probing voir dire of potential jurors on characteristics that both social science and literature predict have an impact on factfinding. Areas such as certitude and cynicism are rarely the subject of current juror voir dire, but perhaps that should change.

sibility of erroneous assessment is quite a significant one among those, like Elizabeth Bennett, most likely to be confident in their own ability to judge. Conversely, if those, like Jane, who are most reluctant to rely on their own assessments of demeanor are the most likely to be accurate, then a significant number of factfinders will, in circumstances when their judgments are sound, nevertheless defer to the erroneous findings of others. Austen's insights suggest that the accuracy of a factfinder's determinations hinges on qualities, like Jane's simplicity, that are particular to the factfinder rather than the witness or the proof, and that are impossible to discern except through long knowledge of a person.

If that is correct, then the preferencing of hearsay is not justifiable. One possible solution would be simply to abandon categorical restrictions on hearsay evidence, placing it on a more equal footing with live testimony. Others have written about the possibility of reworking the rules regarding hearsay so that they are fundamentally discretionary, rather than subject to categorical rules of admission or exclusion.⁸⁶ Under

86. See, e.g., Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 495 n.1 (1987) (cataloguing the list of "the most severe critics of the traditional hearsay rule's exclusionary principle, and of categorical exceptions that regulate the admission of hearsay into trials," including Wigmore, Morgan, McCormick, James, and Weinstein); Weinstein, *supra* note 33, at 338 ("Apart from the greater burden on the judges, it would seem desirable to abandon the class exception system and substitute individual treatment if such a practice were to be combined with advance notice to the opponent when hearsay was to be introduced. Hearsay would then be admissible when it met the usual standard for admission of any line of proof—i.e., a reasonable man might be appreciably more satisfied about the truth or falsity of a material proposition with the evidence than without it."); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 52 (1987) (observing that "the legal scholars of this century have tended to be supporters of simplification or abolition [of the hearsay rule] while the practicing bar has tended to defend the rule and tolerates its intricacies," and proposing broad liberalization of the hearsay rule in civil cases only).

Rule 807 (formerly 803(24)), the residual exception, captures the essence of the discretionary approach, providing that

[a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 807. If the categorical exceptions were eliminated, then they would no longer serve as reference points for Rule 807's "equivalent circumstantial guarantees of trustworthiness," and it would then be for the court, pursuant to Rule 104(a), to determine whether this open-ended measure of reliability were met. The framers of the Federal Rules originally proposed such a rule of general admissibility, but it proved unacceptable to legislators. See Mueller, *supra* note 17, at 377 n.35 (citing FED. R. EVID. 8-03(a) (Preliminary Draft 1969), reprinted in 46 F.R.D. at 377 (admitting hearsay "if its nature and the special circumstances under which it was made offer assurances of accuracy")).

At least one commentator has observed that the combined effect of the existing hearsay rule and its exceptions is that, in the end, most hearsay reaches the factfinder. Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 293 (1980). While the empirical evidence of this is

such a regime, hearsay evidence would be assessed by a trial judge using the traditional criteria of relevance and reliability, unconstrained by characteristics that, at least by Austen's measure, do not have much impact on the jury's likelihood of misusing that evidence.⁸⁷ This approach has certain advantages, such as flexibility, that are missing from the current rules' approach. Moreover, it recognizes the range of variables that shade the question of the reliability of hearsay by allowing the trial judge to admit hearsay for reasons other than those articulated in the current list of exceptions.

There is, undoubtedly, a cost to abandoning the categorical exceptions approach to the existing hearsay rule, including litigants' interests in having predictable rules upon which to construct their trial strategies, and in having judicial discretion constrained to preclude bias.⁸⁸ Yet the force of Austen's literary insight is to the effect that the quality of the source of proof is of less significance in an accurate determination of fact than other variables unrelated to source. Moreover, Elizabeth Bennett's facility with the manipulative possibilities of hearsay (as with Miss Bingley's letter to Jane) demonstrates that at least the more savvy juror is fully capable of assigning the appropriate weight to proof that is from a hearsay source.⁸⁹

In addition, trial courts might incorporate Austen's observation that certitude is at odds with accurate factfinding, by implementing a kind of

mixed, see Mueller, *supra* note 17, at 382 n.48 (citing Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473, 501-03 (1992) (reporting survey results that indicated that much hearsay is excluded)); Myrna S. Raeder, *A Response to Professor Swift: The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Discretion?*, 76 MINN. L. REV. 507, 514 (1992) (presenting a study in which hearsay was admitted in over half the instances in which it was offered pursuant to the residual exception), if it proved true then there would be no need to "repair" the rule.

87. See Park, *supra* note 86, at 52 (noting that the abandonment over the past century of a variety of rules of exclusion is based on "the principle, often regarded as virtually self-evident, that it is better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information").

88. Mueller, *supra* note 17, at 396-97. Professor Mueller himself provides the rejoinder to these arguments, noting that the prevention of uncertainty is not alone enough reason to sustain a hearsay rule since "both the civil and criminal rules permit each side to keep many out-of-court statements under wraps, so neither side is sure to know what hearsay will be offered." *Id.* at 396.

89. See, e.g., Weinstein, *supra* note 33, at 335 (noting that "the risks in using hearsay are exaggerated because the trier tends to recognize the difficulty in evaluating the probative force of hearsay and does not rely heavily upon it when he is aware that it is hearsay"). The more vulnerable juror, like Jane, might fall victim to an inappropriate reliance on proof from a hearsay source, but when, as here, this simplicity is coupled with tentativeness, the combination makes her unlikely to persuade other jurors to join her in that credulousness.

preemptive Allen charge,⁹⁰ in which jurors are advised to give due weight to their own assessment of the evidence, including demeanor evidence of live witnesses, but are also reminded that the judgments of others,

90. The term "Allen charge," also known as the "depth charge" or "dynamite charge" for its effectiveness in "blasting" jury deadlock, see *People v. Gainer*, 566 P.2d 997, 1000 (Cal. 1977), derives from an 1898 decision, *Allen v. United States*, 164 U.S. 492 (1896). In that case, the Supreme Court approved the giving of an instruction to a deadlocked jury that was,

"in substance," that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men [sic], equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they had might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501.

This charge is controversial coming, as it ordinarily does, during jury deliberations. Indeed, three circuits of the U.S. Court of Appeals and twenty-two states do not allow it at that stage. See *Gainer*, 566 P.2d at 1000, 1002-03 (prohibiting such a charge in California "[b]ecause it instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice"); *id.* at n.8 (citing state cases). See also Comment, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. CHI. L. REV. 386, 388 (1964). The American Bar Association recommends against giving such an instruction, instead approving an instruction "that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict." ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (Tentative Draft 1968), § 5.4(a)(v). Kalven and Zeisel suggest that the instruction is almost never given to American juries, see Kalven & Zeisel, *supra* note 13, at 453-55, although anecdotal evidence is to the contrary. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231, 234-35 (1988), affirming capital sentence despite trial judge's instruction to jury on second day of deliberations that

[e]ach of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Id. at 235.

Such an instruction, if given prior to the initiation of deliberations, might address much of the criticism leveled at it as a deadlock-breaker. It would not fall afoul of the concern that juries not consider extraneous materials, since it would be part of the regular charge, with no greater weight than any other instruction on law or the deliberation process; it would not, as it does during deliberations, encroach upon the right of a defendant (in a criminal case) to a unanimous verdict, since it would be given to the entire jury before any could be identified as a holdout or minority; and as part of the package of instructions, it would have little, if any, coercive aspect. Moreover, the rules governing the timing of jury instructions are sufficiently open-ended to permit such an instruction prior to the start of deliberations. See FED. R. CIV. P. 51 (permitting trial judge to "instruct the jury before or after argument, or both"); FED. R. CRIM. P. 30 ("The court may instruct the jury before or after the arguments are completed, or at both times.").

though different, are equally sound. As the Supreme Court observed about such an instruction when given during deliberations:

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case as that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself.⁹¹

If, as Austen suggests, there are some jurors who are at risk of persisting in misjudgments of demeanor and of credibility in general, there is little cost in instructing them to be more open-minded.

At the same time, those who are too deferential could benefit from a judicial pep-talk as to the reliability of their own, sometimes more accurate, findings. What the *Allen* charge does for those too strongly bound to their own views in the face of opposition, a complementary instruction might do for those too weak, encouraging tentative factfinders (those who, according to Austen, are more likely to be accurate in their determinations of credibility and fact) to stick to their guns.⁹² The requirement of unanimity could perhaps be explicated for jurors, as a mechanism designed to support the minority juror against the majoritarian pressure inherent in group dynamics.⁹³ Such an instruction would strengthen the

91. *Allen*, 164 U.S. at 501-02.

92. See, e.g., *Lowenfield*, 484 U.S. at 235 (instructing as follows: "Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong *but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.*") (emphasis added).

93. Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 440 (2000) (noting that "after initial votes are taken, jurors in the minority coalition are often the objects of hostility and impatience") (citing Charles Nemeth, *Interaction between Jurors of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOL. 38, 38-56 (1977)). See generally SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988).

Much has been written about the continued validity of a rule of unanimity, and arguments have been made to abandon that rule. See, e.g., Schwartz & Schwartz, *supra*, at 438 (arguing that unanimous verdict rule is "the most extreme form of minority rule") (citing CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, *NON-UNANIMOUS JURY VERDICTS: A NECESSARY CRIMINAL JUSTICE REFORM* 12 (1995) (unpublished position paper on file with author) (citing a California poll in favor of adopting a rule allowing 10-2 verdicts)). It is nevertheless a well-established aspect of our adjudicatory system and its pedigree and longevity suggest that we do value the procedural and substantive consequences of such

resolve of tentative but perhaps accurate factfinders as against the force of their overconfident but mistaken colleagues and might produce more accurate adjudications.

II. CHARACTER EVIDENCE: PROPENSITY AS PROOF

Another traditionally sacrosanct area of evidence rules is that of propensity. Generally speaking, jurors are forbidden from using evidence of a person's character or a trait of character to support an inference that a person acted "in conformity therewith on a particular occasion."⁹⁴ According to these rules, it would be improper to attempt to judge the truth of an event based upon one's assessment of an individuals' character, as demonstrated through his conduct in other past events.⁹⁵ Yet, in our quotidian factfinding, such character evidence and inferences therefrom form the basis of many a judgment and conclusion.⁹⁶

a rule, including its production of thorough deliberations, and its role in underscoring the legitimacy of resulting verdicts.

94. FED. R. EVID. 404(a).

95. This rule has been essentially abandoned, at least insofar as sexual assaults are concerned. Rules 413, 414, and 415 of the Federal Rules of Evidence, enacted as part of the 1994 Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994), permit the admission of prior bad acts evidence on "any matter to which it is relevant." See Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2437, 2469 (2000) (noting that Rules 413-15 "thus abolish, at least with regard to these two types of crimes [rape and sexual assault on a child], the existing bright-line rules that prohibit the prosecution's use of a criminal defendant's character to prove conduct").

This standard of broad admissibility trumps that set out in Fed. R. Evid. 404, and makes such evidence subject only to the general discretionary exclusion of Rule 403. See, e.g., *United States v. LeMay*, 260 F.3d 1018, 1022 (9th Cir. 2001) (holding that Rule 414 "is not a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant," but is instead subject to Rule 403).

Moreover, some scholars argue that, even in areas outside of sexual assault, the propensity ban has been eviscerated by judicial exercise of discretion to admit prior acts evidence pursuant to Fed. R. Evid. 404(b), ostensibly for purposes other than to prove character. See Swift, *supra* note 95, at 2469 ("Many commentators believe that trial courts are already admitting character-to-conduct evidence against criminal defendants on their own, in cases quite apart from Rules 413 through 415.").

96. See, e.g., Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 222 (1996) (observing that "[a]ll of us engage in 'character reasoning' in our daily lives. We want to know whether someone will prove to be a good or poor spouse, an easy or hard grader, a good or bad friend, or a supportive or indifferent colleague. . . . In light of our own approach in assessing the behavior of others, it is no wonder that, to many of us, this prohibition defies common sense."). Indeed, it is perhaps because quotidian factfinding relies so heavily on propensity inferences that the prohibition has been erected. See Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 519 (1992) (contending that the propensity ban is proper in rape cases since "[t]he danger with such evidence is not that it proves so little, but that it may prove too much"). The willingness of jurors to determine the truth of a particular event through conclusions about character and inferences therefrom poses too grave a risk of inaccuracy.

Jane Austen's use of character evidence reflects this intuitive reliance. Indeed, it can hardly be otherwise given that a novelist's success in general depends to no small degree on an ability to draw characters whose "truth" or verisimilitude derives from their consistent adherence to certain traits, or whose characters undergo some transformation from one recognizable set of behaviors to another.⁹⁷ Austen follows this pattern, relying heavily on both the perceptibility and predictability of traits of character to construct her plot and shape her meaning.⁹⁸ In *Pride and Prejudice*, she depicts a world of human relations in which one need only determine how another has conducted himself in the past in order to gauge his worth in the present or his reliability in the future. In this way, then, Austen casts herself with the trait theorists,⁹⁹ fully repudiating any ban on propensity evidence for her factfinders, whether they are the characters themselves or the readers to whom Austen presents them.

Indeed, much of the unraveling of error comes from recognition of the indelibility of certain characters' traits. As with hearsay, discussed above, these realizations unseat erroneous judgments based upon demeanor evidence, demonstrating from another perspective that our confidence in our own assessments of character ought to yield to the accretion of understanding of character over time by the community as a whole. So, Elizabeth learns, in a letter from Darcy, that Wickham is a rogue—that is, that he has engaged in conduct (eloping with Georgiana

97. See, e.g., FORSTER, *supra* note 1, at 70–71 ("The novelist, unlike many of his colleagues, makes up a number of word-masses roughly describing himself (roughly: niceties shall come later), gives them names and sex, assigns them plausible gestures, and causes them to speak by the use of inverted commas, and perhaps to behave consistently."); FRYE, *supra* note 3, at 304–05 ("The essential difference between novel and romance lies in the conception of characterization. The romancer does not attempt to create 'real people' so much as stylized figures which expand into psychological archetypes. . . . The novelist deals with personality, with characters wearing their *personae* or social masks.").

98. As Professor White puts it in his essay on *Emma*:

[F]or Jane Austen, [language and character] are one; at least they are different aspects of the same unity. She has no notion of a self untouched by its conduct or of a mind or heart divorced from its expressions. In speech and behavior that character is at once expressed and determined. No sharp line separates the self from deed and word, and what a person says or does is a manifestation of character as directly continuous with the self as if it were made of the same tissue: the language is the mind.

White, *supra* note 16, at 184.

99. See Mendez, *supra* note 96, at 227 (noting that "trait theorists came to believe that traits 'are relatively stable and enduring predispositions' which exert sufficient influence to produce generally consistent behavior across widely divergent situations") (quoting WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6 (1968)). Mendez writes elsewhere that, contrary to the assumptions of these trait theorists, "research conducted for much of this century showed that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior." Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem to Be Predictable Characters"*, 49 HASTINGS L.J. 871, 878 (1998).

Darcy, squandering his inheritance) that supports an inference that he has character traits of deception, dissipation, and lechery, which in turn support the inferences that he deceived her on the particular occasion when he spoke to her of Darcy's maltreatment, and that he is likely to try to seduce other young women of his acquaintance. Austen offers these insights as truths that Elizabeth attains only by discarding her own inaccurate assessments of Wickham's good moral character and character for truthfulness; assessments she had used to conclude that he had indeed been mistreated by Darcy.

Indeed, when Elizabeth realizes her error as to Wickham, she tries, retrospectively, to reconcile conflicting proofs that are themselves prototypes of demeanor and propensity evidence. She thinks, of Wickham:

His countenance, voice, and manner, had established him at once in the possession of every virtue. She tried to recollect some instance of goodness, some distinguished trait of integrity or benevolence, that might rescue him from the attacks of Mr Darcy; or at least, by the predominance of virtue, atone for those casual errors, under which she would endeavor to class, what Mr Darcy had described as the idleness and vice of many years continuance. But no such recollection befriended her. She could see him instantly before her, in every charm of air and address; but she could remember no more substantial good than the general approbation of the neighbourhood, and the regard which his social powers had gained him in the mess.¹⁰⁰

In this passage, Austen explicitly juxtaposes "countenance, voice, and manner," and "charm of air and address" with "some instance of goodness, some distinguishing trait of integrity or benevolence," weighing the demeanor evidence that she has against the character evidence that she lacks. In hoping to find some episode of good conduct, Elizabeth implies that character as proven through propensity is, for her, a more persuasive proof that the mere "charm of air and address" that she had till then relied upon.

When Wickham runs off with Lydia, his character is determined irrevocably. Elizabeth says: "But Jane knows, as well as I do, what Wickham really is. We both know that he has been profligate in every sense of the word. That he has neither integrity nor honour. That he is as false and deceitful, as he is insinuating."¹⁰¹ This determination is, for Austen, conclusive proof of Wickham's capacity to engage in conduct in conformity with these character traits at any time in the future.

100. AUSTEN, *supra* note 7, at 234-35.

101. *Id.* at 301.

Similarly, with respect to Darcy, the difficulty is not whether character can be a reliable predictor of future conduct, but rather how to determine accurately what Darcy's character is: either "the proudest, most disagreeable man in the world,"¹⁰² or "the sweetest-tempered, most generous-hearted boy in the world."¹⁰³ Austen allows Elizabeth to explain this difficulty when, as Elizabeth's opinion of Darcy is beginning to change, she encounters Wickham in Meryton. When Elizabeth says "I think Mr Darcy improves on acquaintance," Wickham cries out in surprise and asks whether Darcy has "improved in essentials."¹⁰⁴ Elizabeth replies: "In essentials, I believe, he is very much what he ever was. . . . When I said he improved on acquaintance, I did not mean that either his mind or manners were in a state of improvement, but that from knowing him better, his disposition was better understood."¹⁰⁵ Accordingly, character is, for Austen, knowable and essential in determining facts; indeed it is the pursuit of this knowledge that drives the narrative.

The Federal Rules of Evidence preclude this use of propensity, but do permit a different treatment of propensity in the narrow instance of character for truthfulness or untruthfulness.¹⁰⁶ To that extent only, the rules embrace Austen's view that character traits are reliable predictors of conduct on a particular occasion, at least where the conduct involves testifying. Austen's use of character is, however, far more broad. Once we label an individual as being of good moral character, that label becomes a signifier for an array of traits that go well beyond the Federal Rules' notion of truthfulness, to embrace good behavior in general. Everything from tact to generosity are expected of a person of good moral character.

III. PRIVILEGE: RECALIBRATING THE BALANCE

There are several instances in *Pride and Prejudice* in which characters withhold information from the larger community of factfinders, based upon a perceived need for confidentiality as a means of maintain-

102. *Id.* at 58 (opinion of the assembly at the first ball).

103. *Id.* at 270 (description of Darcy by the housekeeper).

104. *Id.* at 260.

105. *Id.* at 260-61.

106. See FED. R. EVID. 608(b) (permitting credibility of a witness to be attacked or supported by evidence of specific instances of conduct, "if probative of truthfulness or untruthfulness"); FED. R. EVID. 609 (permitting evidence of prior convictions for the purpose of attacking the credibility of a witness).

It is interesting to consider whether a trial judge would permit evidence of Wickham's attempted seduction of Georgiana as evidence of conduct probative of untruthfulness under 608(b). Its lascivious aspect would likely result in its exclusion, although the deceit and breach of trust involved might result in its admission.

ing a relationship, usually familial. In each of these instances, Austen takes pains to reveal that the balance struck by those withholding information—confidentiality versus disclosure—is wrongly calibrated and imposes excessive social costs. For her, privilege rules unreasonably thwart accurate and just determinations of fact.

Most notably, Darcy determines to withhold from all others the circumstances of his young sister's near-elopement with Wickham. This secrecy operates to the great injury of Lydia Bennett. The closing third of the novel is centered on the efforts he takes to repair that injury, and on his acceptance of responsibility for Wickham's access to Lydia. Through these efforts, which he tries in vain to keep secret, Darcy wins Elizabeth's gratitude and respect.

But restricting access to information relevant to Wickham's character and the danger he might represent to other young women is not Darcy's doing alone. When Elizabeth learns from Darcy of the elopement of Georgiana and Wickham, she confides in Jane, but together they agree that the information should go no further. Elizabeth asks Jane "whether I ought, or ought not to make our acquaintance in general understand Wickham's character," to which Jane replies: "Surely there can be no occasion for exposing him so dreadfully."¹⁰⁷ Elizabeth concurs "[t]hat it ought not to be attempted. Mr Darcy has not authorised me to make his communication public. On the contrary every particular relative to his sister, was meant to be kept as much as possible to myself"¹⁰⁸

The withholding of information regarding the elopement is calculated to protect and strengthen a relationship—here, Darcy's with his young sister, Georgiana¹⁰⁹—at the expense of access to intelligence that would almost certainly affect the community's judgment of Wickham.¹¹⁰

107. AUSTEN, *supra* note 7, at 253.

108. *Id.* In fact, a close reading of Darcy's letter to Elizabeth reveals no such injunction. It is instead apparently inferred by Elizabeth from the circumstances themselves. Nevertheless, Elizabeth treats this as information that she is prohibited from sharing. Even after Lydia's flight, she tells Mrs. Gardiner of Wickham's "infamous behavior to Mr Darcy," but continues, "[a]nd there are other circumstances which I am not at liberty—which it is not worth while to relate." *Id.* at 301.

109. *Id.* at 231.

110. Protection of this relationship is, presumably, Darcy's motive in keeping the elopement a secret, although Jane and Elizabeth seem animated by concern for Wickham more than for Georgiana. "To have his errors made public might ruin him forever," says Jane. *Id.* at 253. And Elizabeth reaffirms this later when she explains to Aunt Gardiner that Lydia knew nothing of Wickham's character:

Oh yes!—that, that is the worst of all. Till I was in Kent, and saw so much of both Mr Darcy and his relation, Colonel Fitzwilliam, I was ignorant of the truth myself. And when I returned home, the—shire was to leave Meryton in a week or fortnight's time. As that was the case, neither Jane, to whom I related the whole, nor I, thought it necessary to make our

As with most privileges,¹¹¹ the question is whether that protection is justified given the cost to the factfinders of being deprived of information critical to their determinations of the respective worth of Wickham and Darcy.¹¹²

knowledge public; for of what use could it apparently be to any one, that the good opinion which all the neighbourhood had of him, should be overthrown?

Id. at 301.

III. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'") (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)); see R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1633 (2003) ("Under the utilitarian view, the privilege protecting confidential communications with clergy, like the attorney-client and psychotherapist-patient privileges, is grounded in a policy of preventing disclosures that would tend to inhibit the development of a confidential relationship that society has decided is socially desirable.").

The strengthening of a relationship is, however, not alone sufficient to warrant recognition of a privilege for a particular communication. Instead, the touchstone for this balancing of interests has long been Wigmore's four-factor test, which requires that all four considerations be met before a privilege be recognized by a court:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2285 (1905). See Edward J. Imwinkelreid, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come Into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 242 (2002) (observing of Wigmore's treatise, "while the doctrinal analysis in volume eight is terribly out of date, at a theoretical level the courts still look to the evaluative criteria that Dean Wigmore prescribed in section 2285 of the volume for determining when to recognize a privilege").

112. Scholars have debated the issue of the appropriate balance to be struck between disclosure and protection of confidential communications throughout the history of such privileges. See WIGMORE, *supra* note 111, § 2291, at 3204 (observing, of the attorney-client privilege, that "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete"); James J. Dalessio, Comment, *Evidentiary Principles and the Exclusion of Derivative Evidence: Commentary and Analysis*, 26 SAN DIEGO L. REV. 625, 629 (1989) (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 193-94 (J. Mill. ed., 1827)) (describing privileges as "one of the most pernicious and irrational notions that ever found its way into the human mind"); Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 85 (1973) (describing privileges as "mere bothersome exclusionary rules, born of competing professional jealousies, that impede the accuracy of fact finding and serve no other important societal goals"); David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 107-09 (1956) (approving privilege rules as "protect[ing] significant human values" and their social costs as "secondary and an incidental feature of [their] vitality"); see also Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31 (2000) ("Most evidentiary rules further the search for truth. . . . The law of privileges is a stark exception because it conceals evidence that is

Significantly, the relationship protected by Darcy's discretion is a familial one, and hence is not within the traditional list of protected relationships to which rules of privilege have been addressed.¹¹³ Austen's narrative plainly suggests that Darcy's conduct in protecting his young

highly reliable and probative."); Cassidy, *supra* note 110, at 1687-99 (proposing limitations on the priest-penitent privilege in light of the clergy abuse crisis).

Courts have also wavered in their assessment of the need for a rule of privilege as against the need for the factfinder to have access to information. *See, e.g., Trammel*, 445 U.S. at 50 ("Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcend the normally predominant principle of utilizing all rational means for ascertaining truth.'") (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950), and *Elkins v. United States*, 364 U.S. 206, 234 (1960)); *United States v. Nixon*, 418 U.S. 683, 710 (1974) (noting that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth"); *Jaffee*, 518 U.S. at 19 (Scalia, J., dissenting) (cataloguing instances in which the Court has rejected new privileges, including rejecting "privilege against disclosure of academic peer review materials" (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201-02 (1990)), rejecting "privilege against disclosure of 'legislative acts' by member of state legislature" (citing *United States v. Gillock*, 445 U.S. 360, 374 (1980)) and "constru[ing] narrowly the scope of existing privileges," such as "permitting *in camera* review of documents alleged to fall within crime-fraud exception to attorney-client privilege" (citing *United States v. Zolin*, 491 U.S. 554, 568-70 (1989))). Federal Rule of Evidence 501 is a manifestation of the deep ambivalence of courts in this area, since it is merely a choice of law provision rather than an attempt to codify or homogenize the substance of privilege law. FED. R. EVID. 501.

113. The relationships most typically within the protection of exclusionary rules of privilege have been those between attorney and client, *see Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton Rev. 1961)); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); doctor and patient, *see Prink v. Rockefeller Ctr. Inc.*, 398 N.E.2d 517, 520 (N.Y. 1979); priest and penitent, *see In re Grand Jury Investg.*, 918 F.2d 374, 377 (3d Cir. 1990); ANSONE STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 556 (1964) ("[I]n general the courts hold that the confidence which was recognized by the English common law as existing between lawyer and client should also exist between physician and patient and between priest as confessor and his parishioner or other penitent. This applies not only to the Roman Catholic Church with its regular confessional but also to similar confidence between non-Catholic clergymen, when acting as such, and their parishioners."); and husband and wife, *see Trammel*, 445 U.S. at 53 (recognizing rule of spousal disqualification that reposes with testifying spouse); *Blau v. United States*, 340 U.S. 332, 333 (1951); *Wolfe v. U.S.*, 291 U.S. 7, 14 (1934) (recognizing confidential marital communication privilege).

Other relationships have, more recently, come within the shelter of newly recognized rules of privilege, even while familial relationships have remained largely unprotected by such rules. *Compare Jaffee*, 518 U.S. 1, 17 (recognizing psychotherapist-patient privilege protecting not only licensed psychologists and psychiatrists, but also licensed social workers in the course of psychotherapy), with *In re Grand Jury*, 103 F.3d 1140, 1146 (3d Cir. 1997) (noting that "[a]lthough legal academicians appear to favor adoption of a parent-child testimonial privilege, no federal Court of Appeals and no state supreme court has recognized such a privilege," and summarizing rationale). Accordingly, prosecutors have been able to compel the testimony of Monica Lewinsky's mother, and others similarly situated, before a grand jury and at trial.

and orphaned sister is understandable, even laudable.¹¹⁴ Thus, it is something of a surprise that Austen's plot subjects Darcy's judgment as to the need for secrecy to strong condemnation.¹¹⁵

This narrative ambiguity as to the propriety of Darcy's choice of secrecy suggests two corresponding, and also antithetical, approaches to the question of a familial privilege, one of which is to recognize a privilege and the other of which is to deny it. Yet the case law as to this question is more uniform, rejecting familial privilege.¹¹⁶ This uniformity of

114. Austen writes, in Darcy's voice, in his long letter to Elizabeth at the midpoint of the novel: My sister, who is more than ten years my junior, was left to the guardianship of my mother's nephew, Colonel Fitzwilliam, and myself. About a year ago, she was taken from school, and an establishment formed for her in London; and last summer she went with the lady who presided over it, to Ramsgate; and thither also went Mr Wickham, undoubtedly by design; for there proved to have been a prior acquaintance between him and Mrs Younge, in whose character we were most unhappily deceived; and by her connivance and aid, he so far recommended himself to Georgiana, whose affectionate heart retained a strong impression of his kindness to her as a child, that she was persuaded to believe herself in love, and to consent to an elopement. She was then but fifteen, which must be her excuse; and after stating her imprudence, I am happy to add, that I owed the knowledge of it to herself.

AUSTEN, *supra* note 7, at 231.

This fictional treatment of the need for confidentiality differs considerably with the judicial calibration of that need as against the need for the information contained in a familial communication. In *In re Grand Jury*, 103 F.3d at 1152, for example, the Court of Appeals for the Third Circuit held that each of the Wigmore factors warranting recognition of a privilege was unmet. In particular, the court held that "it is not clear whether children would be more likely to discuss private matters with their parents if a parent-child privilege were recognized than if one were not," although Darcy proudly tells Elizabeth, as a set off to Georgiana's imprudence in eloping, "that I am happy to add, that I owed the knowledge of it to herself." AUSTEN, *supra* note 7, at 231. The court also held that "any injury to the parent-child relationship resulting from non-recognition of such a privilege would be relatively insignificant." *In re Grand Jury*, 103 F.3d at 1153.

While the case does not address sibling relationships, it seems likely that they would receive a similarly dismissive treatment by that court. Austen, on the other hand, presents Darcy's solicitousness as to Georgiana's interests as a virtue rather than a flaw, and presumes that a grave injury to their relationship would result from disclosure of the confidential information regarding her conduct.

115. The last third of the novel centers on the struggle to extricate Lydia from the consequences of a rash elopement with Wickham that is nearly identical to that he nearly achieved with Georgiana. Those who had been aware of Wickham's bad character—Elizabeth, Darcy, and Jane—suffer hindsight self-recriminations for having kept others in the dark and therefore susceptible to Wickham's predatory conduct. AUSTEN, *supra* note 7, at 334 (Aunt Gardiner's letter to Elizabeth in which she tells of Darcy's efforts to rescue Lydia, saying "[t]he motive professed, was his conviction of its being owing to himself that Wickham's worthlessness had not been so well known, as to make it impossible for any young woman of character, to love or confide in him"); *id.* at 294 (Elizabeth to Darcy upon learning of the elopement: "'When I consider,' she added, in a yet more agitated voice, 'that I might have prevented it!—I who knew who he was. Had I but explained some part of it only—some part of what I learnt, to my own family! Had his character been known, this could not have happened.'").

116. See *In re Grand Jury*, 103 F.2d at 1146 (noting that no federal court and no state supreme court has recognized such a privilege, although scholars, on balance, favor such a privilege) (citing Yolanda L. Ayala & Thomas C. Martyn, *To Tell or Not to Tell? An Analysis of Testimonial Privileges: The Parent-Child and Reporter Privileges*, 9 ST. JOHN'S J. LEGAL COMMENT. 163 (1993); Daniel R. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599

approach despite the fictional recognition of the issue's complexity, suggests that the factors that have traditionally been brought to bear on a determination of whether to cloak familial communications with privilege are perhaps not the appropriate ones to employ, or have not been accorded sufficient weight. For example, it seems obvious that the third factor of Wigmore's classic test—whether the community is of the opinion that the relationship in question ought to be “sedulously fostered”—is at its strongest pitch with respect to familial relationships like those of siblings or parent and child. Indeed, it is precisely this factor that informs our sympathy for Darcy, because it accords with our intuited and acculturated sense that familial relationships are at the very top of any list of relationships that are to be fostered by rules of privilege.

Moreover, from the biblical irony of Cain's question, “Am I my brother's keeper,”¹¹⁷ to the contemporary poignancy of Theodore Kaczynski's capture based on information supplied by his brother, David,¹¹⁸ it has long been an unquestioned presumption across many cultures that the relationship between siblings or between parent and child requires confidentiality if it is to thrive.¹¹⁹ This second element of the Wigmore

(1970); David A. Schlueter, *The Parent-Child Privilege: A Response to Calls for Adoption*, 19 ST. MARY'S L.J. 35 (1987).

117. The passage reads:

And Cain talked with Abel, his brother; and it came to pass, when they were in the field, that Cain rose up against Abel, his brother, and slew him. And the Lord said unto Cain, “where is Abel, thy brother?” And he said, “I know not. Am I my brother's keeper?” And He said, “what hast thou done? the voice of thy brother's blood crieth unto Me from the ground. Am I my brother's keeper?”

Genesis 4:9 (King James).

118. Sumathi Reddy, “*It Was Tearing Me to Pieces*”; Kaczynski's Angst Over Brother's Fate, N.Y. NEWSDAY, May 9, 2003, at A29.

David Kaczynski had not seen his brother in nine years when he read the Unabomber's manifesto in 1995. His tip led the FBI to Theodore Kaczynski in April of 1996, the elusive man who was responsible for package bombings that killed three and injured 23 over the course of 17 years. In 1998, Kaczynski was sentenced to life in prison. He remains in a federal prison in Colorado. In a personal speech, Kaczynski chronicled the internal struggle and anguish he experienced, first wondering if his brother was the Unabomber, then living with the decision he made to tell the FBI his suspicions, and finally realizing he could be responsible for his own brother's death.

Id. Compare David Kaczynski's conduct to that of fugitive bomber Eric Rudolph's brother, Daniel.

If only William Faulkner were alive to set it down. In 2001, to protest his brother's fugitive status, Daniel Rudolph rigged a camcorder on a tripod in his South Carolina garage. “This is for the F.B.I. and the media,” he said on the tape he would soon send to federal agents. Then, dressed in a white shirt and a tie, he turned toward the spinning radial-arm saw. Making sure to get a good shot, all alone in his closed garage, he lopped off his entire left hand. After applying a tourniquet, he (off camera by now) drove himself to an emergency room. An ambulance soon returned to fetch the severed hand, which was surgically reattached.

Allan Garganus, *Why We Fed the Bomber*, N.Y. TIMES, June 8, 2003, § 4, at 13.

119. Additional examples include the recent drama in Boston in which James “Whitey” Bulger, an alleged mobster charged with some nineteen murders, has evaded FBI capture while his brother, Wil-

test¹²⁰ also counsels in favor of a privilege, and Austen's presentation of the need for confidentiality as between Darcy and his sister/ward is persuasive on the point. How then can that factor go unmentioned in a judicial application of the test to the relationship of a father and daughter?¹²¹

Austen explores the notion of privilege yet again, as a balancing of these same competing interests, when she permits Elizabeth to withhold from Jane not only Darcy's secret regarding his sister, but also the details of Darcy's role in thwarting Charles Bingley's feelings for Jane. The letter that Elizabeth receives from Darcy contains both bits of information, and she participates with him in weighing the need for disclosure of Georgiana's shame too lightly, as against the needs of the community to be put on notice of Wickham's predatory past. But Austen does not condemn Elizabeth for withholding the ignoble role that her own lover has played in dividing Bingley from Jane. Instead, she permits the reader to approve the balancing of confidentiality against the free flow of information, facilitating the central match of this marriage comedy, even as it thwarts fulfillment of the secondary match. Jane is never permitted to learn of or to express anger about Darcy's meddling, although Elizabeth accuses him of being "the means of ruining, perhaps for ever, the happiness of a most beloved sister."¹²² Instead, Austen writes of Elizabeth:

The tumult of Elizabeth's mind was allayed by this conversation. She had got rid of two of the secrets which had weighed on her for a fortnight, and was certain of a willing listener in Jane, whenever she might wish to talk again of either. But there was still something lurking behind, of which prudence forbade the disclosure. She dared not relate the other half of Mr Darcy's letter, nor explain to her sister how sincerely she had been valued by his friend. Here was knowledge in which no one could partake; and she was sensible that nothing less than a perfect understanding between the parties could justify her in throwing off this last incumbrance of mystery. "And then," said she, "if that very im-

liam Bulger, President of the University of Massachusetts and former President of the Massachusetts State Senate, asserts the privilege against self-incrimination in response to law enforcement inquiries about his brother's whereabouts, see Jules Crittenden, *Panel Grills Bulger; Victims' Kin Claim Billy's All Blamey*, BOSTON HERALD, June 20, 2003, at 6, and the Independent Counsel's subpoenaing of Monica Lewinsky's mother to testify as to her knowledge of Lewinsky's relationship with former President Clinton. See Judy Keen & Kevin Johnson, *For Mom, Spotlight Could Burn*, USA TODAY, Feb. 11, 1998, at 4A (reporting that Marcia Lewis, Monica Lewinsky's mother, had testified before a Grand Jury after her lawyer failed to quash a subpoena); William Safire, *Privilege Proliferation*, N.Y. TIMES, Mar. 5, 1998, at A29 ("We do not need a Clintonian 'Bill of Privileges' saving politicians from scrutiny, blocking the flow of truth and placing any class above the law."); Kate Novack, *How Can We Miss Her . . .*, TIME, May 26, 2003, at 24 (noting that Lewinsky published an op-ed on Mother's Day contending that parents and children should not have to testify against each other).

120. See *supra* note 111 (citing Wigmore test for recognition of privilege).

121. See *In re Grand Jury*, 103 F.3d at 1152.

122. AUSTEN, *supra* note 7, at 222.

probable event should ever take place, I shall merely be able to tell what Bingley may tell in a much more agreeable manner himself. The liberty of communication cannot be mine till it has lost all value!"¹²³

In ruminating over how to proceed with this important confidence, Elizabeth here overlooks a critical aspect of the "knowledge" that she withholds: It is not that Bingley indeed loves Jane, but that Darcy has persuaded him that Jane does not love him.

Indeed, so far from being condemned for his meddling, Darcy himself is credited with righting things by reassuring Bingley that Jane reciprocates his feelings for her.¹²⁴ He does not even share the credit with Elizabeth, who had first put him on notice of his own error of judgment as to Jane's feelings.¹²⁵ Nor does he thank her for keeping his "absurd and impertinent" "interference" a secret from Jane. The connection is simply reestablished, with surprise and joy on the part of both Jane and Bingley, and the novel ends with two marriages.

The relationship protected by this subterfuge is one between would-be lovers, not yet husband and wife, whose relationship is, for much of the time that the secret is withheld, characterized more by enmity than affection, and reflects very little trust. While it may be that such a relationship partakes of the interests that undergird the marital privilege, that privilege has, some would say grudgingly, been permitted to attach only to consummated marriages between a man and a woman.

In the area of privilege, then, Austen does not offer any clear resolution of the thorny balancing of interests that underlies rules of privilege. Instead, she carefully walks a line, allowing the reader to see the costs of both confidentiality and disclosure, condemning both and neither. This approach suggests that a discretionary, rather than a categorical, model of privilege might work best, although the common judicial wisdom is that rules of privilege, if they are to exist at all, must be clear and deter-

123. *Id.* at 253-54.

124. After Elizabeth accepts him, Darcy explains that

I made a confession to him, which I believe I ought to have made long ago. I told him of all that had occurred to make my former interference in his affairs, absurd and impertinent. His surprise was great. He had never had the slightest suspicion. I told him, moreover, that I believed myself mistaken in supposing, as I had done, that your sister was indifferent to him; and as I could easily perceive that his attachment to her was unabated, I felt no doubt of their happiness together.

Id. at 379.

125. Elizabeth asks Darcy: "'Did you speak from your own observation,' said she, 'when you told him that my sister loved him, or merely from my information last spring?'" He replies: "From the former. I had narrowly observed her during the two visits which I had lately made her here; and I was convinced of her affection." *Id.* at 379. Earlier, he had acknowledged: "If *you* have not been mistaken here, I must have been in an error. Your superior knowledge of your sister must make the latter probable." *Id.* at 228.

minate.¹²⁶ At a minimum, the novel provides an opportunity to reflect on the balance presently struck by rules of evidence.

CONCLUSION

Austen's exploration of the modes of proof relied upon in our quotidian factfinding invites a number of areas of reflection on the proof available to adjudicatory factfinders under existing rules of evidence, sometimes augmenting traditional legal and social science scholarship, sometimes challenging it. Austen invites us to reassess the voir dire and deliberation processes in order to identify juror traits that might affect the factfinder's assessment of different types of evidence. She offers support for a broader use of character evidence and against the propensity ban. She also challenges our repose as to the balance of interests manifested in certain established rules of privilege. I hope that these observations provide, if nothing else, good and sufficient reason to read, or reread, the novel.

126. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 387–88 (1998) (refusing to terminate the attorney-client privilege upon the death of the client). In *Swidler*, the Court held that “[b]alancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.” *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)); see *Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996).
